No. 11662.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Introductory Statement.

To the Honorable Ninth Circuit Court of Appeals of the United States of America:

Appellant Phillip Himmelfarb, who throughout this brief will be referred to as appellant, and one Sam Ormont were jointly indicted in the United States District Court for the Southern District of California, Southern Division, on January 22, 1947, for allegedly attempting to evade the payment of income tax in violation of Section 145(b), I. R. C., 26 U. S. C. A., 145(b) [Tr. p. 2]. Appellant was named in two counts of the indictment, namely, Count One [Tr. p. 2], in which he and Sam Ormont were jointly charged with attempting to evade the payment of income tax allegedly due and owing by

Sam Ormont for the calendar year 1944 and, Count Two [Tr. p. 3], in which appellant and Sam Ormont were jointly charged with attempting to evade the payment of income tax allegedly due and owing by appellant for the calendar year 1944. Appellant interposed a plea of not guilty to both Counts I and II of said indictment.

During the course of the trial and at the close of the prosecution's case, appellant was acquitted of the charge in Count I of the indictment [Tr. pp. 1225; 1232]. This appeal is from the judgment entered upon the verdict of the jury, finding appellant guilty of the offense charged in Count II of the indictment.

The decidedly major portion of the testimony and exhibits in this case were admitted solely against appellant's co-defendant, Sam Ormont, and only a minor part of the testimony and exhibits were admitted against appellant. Among the major points raised by appellant on this appeal is the fact that the evidence against appellant is manifestly insufficient to support the verdict of the jury and the judgment entered thereon. It is, therefore, a necessary prerequisite to the proper determination of this appeal that the testimony and exhibits admitted against and received on behalf of appellant be delineated from the entire record.

Preliminarily, however, it should be noted that at the very outset of the trial of this case, it was stipulated and agreed, at the suggestion of the trial court, that any motion, objection or stipulation made by either defendant be deemed made on behalf of both defendants, unless such motion, objection or stipulation is specifically disclaimed [Tr. pp. 240-241]; and it was understood and agreed by and between the Court, counsel for the government, and counsel for the respective defendants, throughout the trial

of this case from its very commencement, that all evidence offered by the government is offered and received against defendant Sam Ormont only, unless government counsel avowed or indicated that the evidence is offered against appellant or against both defendants* [Tr. pp. 347, 348, 355, 372, 378, 379, 380, 390, 448, 450, 451, 545, 602, 872, 968, 1044, 1080, 1081, 1086, 1100, 1143, 1144].

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*Illustrative of the agreement and understanding had throughout the trial are the following excerpts from the transcripts, indicative of the tenor thereof:

Tr. p. 355:

"Mr. Katz: If the court please, with respect to the defendant Himmelfarb, to avoid making the objection to each question as it is made, I think some stipulation will probably expedite the matter. I don't want to have to do that.

The Court: If it will be deemed that you have made the objection to all of the questions asked by government counsel without repeating it, and the same ruling made that I have made so far on these objections, unless government counsel avows that the evidence offered is offered also against Himmelfarb.

Mr. Katz: Thank you, Your Honor."

Tr. pp. 378, 379:

"Mr. Strong: Will counsel stipulate that we can use this photostat in lieu of the original card, that is, Government's Exhibit 25 for identification, the signature card?

Mr. Robnett: Yes.

The Court: What is it?

Mr. Katz: That is a matter I am not concerned with, but it is still my understanding that until such time as you indicate that you are proceeding against the defendant Himmelfarb, you are proceeding against the defendant Sam Ormont.

Mr. Strong: Yes."

Tr. p. 448:

"Mr. Katz: That is objected to, if the Court please, on behalf of the defendant Himmelfarb, as not binding upon him in any way, and hearsay as to him.

The Court: The objection will be sustained. I take it, it will not be necessary at each session of the court to renew the

Jurisdiction.

The jurisdiction of the lower court was founded upon Judicial Code, Section 24, as amended, 28 U. S. C. A., Section 41, subdivision 2, and the jurisdiction of this court is founded upon Judicial Code, Section 128, as amended, 28 U. S. C. A., Section 225, subdivision a.

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understanding had by counsel, that this is offered only presently as against the defendant Ormont?

Mr. Strong: At the present time the understanding is the same.

The Court: Very well."

Tr. p. 450:

"Mr. Katz: Objected to, if the Court please, as to that question, in so far as the defendant Himmelfarb is concerned—

Mr. Strong: We have agreed as to each question. I have not mentioned his name.

The Court: The objection will be sustained. The jury will receive this evidence as against the defendant Ormont only, and disregard it as to the defendant Himmelfarb.

The Witness: On a calendar year basis.

The Court: It will be assumed that objection will be made to each question, and the same ruling made, as to each one, unless the prosecutor avows that it is offered for connecting the defendant Himmelfarb, or it is obvious from the question that it applies to the defendant Himmelfarb."

Tr. p. 1086:

"Q. (By Mr. Strong): You were asked concerning some invoices which you said you took. I will now show you invoices in evidence which are marked Government's Exhibits 38 and 39 and ask you if you took any one of these invoices.

Mr. Katz: If the Court please, I presume now we are reverting back to where the understanding is that the objection has been made and the same ruling with respect to further questions asked by Mr. Strong.

Mr. Strong: At the present time I am not applying it to the defendant Himmelfarb.

The Court: Very well.

Mr. Katz: He tells me when he is not but I can never tell when he is.

The Court: He is not except when he says he is.

Mr. Strong: That is right, Your Honor."

Statement of Facts.

Appellant, on March 14, 1945, filed with the Collector of Internal Revenue at Los Angeles, California, an income tax return for the calendar year 1944, showing his net taxable income for that year, computed on the community property basis, to be $4,111.74, and the tax thereon to be $656.00 [Ex. 4, rec'd in evid., Tr. p. 345]. On the same day, Ruth Himmelfarb, appellant's wife, filed an income tax return with the same Collector and for the same calendar year showing her net taxable income for the calendar year 1944, computed on the community property basis, to be $4,611.74, and the tax thereon to be $766.00 [Ex. 5, rec'd in evid., Tr. p. 345]. The amounts of income shown as due on the respective returns of appellant and his wife were paid by them [Tr. p. 363].

On May 24, 1945, there was filed with the Collector of Internal Revenue at Los Angeles, California, an Information Return by Sam Ormont and appellant, as joint venturers, for the fiscal period May 1, 1944 to April 30, 1945, disclosing a net income of $71,388.84 for that fiscal period, and the distribution thereof to Sam Ormont and appellant equally, to-wit: $35,694.42 [Ex. 6, rec'd in evid., Tr. p. 383].

Hugh R. Pingree, a government witness, is the manager of the Bank of America, First and Chicago branch, Los Angeles. Pursuant to subpoena, he brought certain records of that bank, disclosing that appellant opened a commercial account on March 14, 1942 [Tr. pp. 380, 383, 559]. Exhibit 32 [rec'd in evid., Tr. p. 386] is a photostatic copy of that signature card [Tr. p. 383]. An application was made for the issuance of a cashier's check by the bank to Acme Meat Co., in the amount of

$3,150.00, and Exhibit 34 [rec'd in evid., Tr. p. 386], is a photostatic copy of such application [Tr. p. 385]. Exhibit 35 [rec'd in evid., Tr. p. 386] is a photostatic copy of the cashier's check issued pursuant to such application [Tr. p. 385]. Exhibit 36A [rec'd in evid., Tr. p. 386, p. 557], are copies of ledger sheets for that account for the period December 24, 1943 to March 15, 1945 [Tr. p. 386, p. 557].

Ernest Link, a witness for the government, is acquainted with appellant, having known him since 1944 [Tr. p. 393]. He saw appellant performing work on the premises of Acme Meat Co., during 1944 and 1945, and observed appellant make out invoices to customers of Acme Meat Co., compute the amount due from the customers, and compute the weight of the bill with the figure 3, which amount he entered on a list kept in a drawer of a desk in the office of the Acme Meat Co. [Tr. pp. 429, 430]. Mr. Link also saw appellant selling beef and other cuts to the trade [Tr. p. 431]. Mr. Link did not make out the payroll checks, but did audit and check them against the books. There were payroll checks to appellant [Tr. p. 433]. He at one time examined the list on which he had seen appellant make entries, observed that it contained names of customers and amounts opposite such names, some of which were written in the handwriting of appellant and some in the handwriting of Sam Ormont; some were marked paid and crossed out, but he never saw appellant receive any money in connection with that list. Mr. Link did not record any amounts appearing on the list in the books and records of the Acme Meat Co. [Tr. pp. 434-435].

The profits from the Acme Meat Co. for the year 1944 were credited to the account of Sam Ormont on the books and records of Acme Meat Co. [Tr. p. 436].

J. Bryant Eustice, a government witness, is acquainted with appellant, having first become acquainted with him about November 8, 1945, in connection with the performance of his official duties as an agent for the Bureau of Internal Revenue. Mr. Eustice was assigned to conduct an investigation of the 1942, 1943 and 1944 income tax returns of both Sam Ormont and the appellant [Tr. p. 507].

At the time Mr. Eustice made his investigation, he had in his possession the original of Exhibit 4, the photostatic copy of the 1944 income tax return of appellant, and the original of Exhibit 5, the photostatic copy of the 1944 income tax return of Ruth Himmelfarb [Tr. p. 510].

He had not examined Exhibit 32, which is the signature card of the commercial account of appellant in the Bank of America, or Exhibit 33, for identification, the photostatic copy of a deposit slip of appellant, or Exhibit 34, the application signed by Ruth Himmelfarb for a cashier's check, in the amount of $3,150.00, made payable to Acme Meat Co. [Tr. pp. 515-516].

Mr. Eustice examined the books and records of the Acme Meat Co. in the office of that company, in connection with his investigation into the income tax return of appellant for the year 1944 [Tr. pp. 517-518], and made a transcript of certain accounts therefrom, which are a part of his work papers [Tr. p. 519].

Mr. Eustice, about the middle of November, discussed with appellant his status with reference to the Acme

Meat Co., at which time Mr. Phoebus was present. Mr. Eustice believes he had other discussions respecting appellant's relationship thereto prior to that date [Tr. pp. 887-888].

The examination of the books and records of Acme Meat Co. was made about the latter part of November, 1944 [Tr. p. 950]. On the first occasion that he examined those books and records with reference to the income of appellant for the year 1944, Mr. Phoebus was present [Tr. p. 951].

On that occasion Mr. Eustice did not make a copy of the entries of the records of the Acme Meat Co. with reference to any money paid to or by appellant for the year 1944, but did make such copy about four weeks later. After Mr. Eustice first visited the Acme Meat Co. the books were always available to him and he just went into the office and went to work on the books [Tr. pp. 951-952].

Mr. Eustice did not have the books and records at the time of trial, and last saw them at the office of the Acme Meat Co. [Tr. p. 953].

On the basis of the investigation, Mr. Eustice made a determination as to whether there was any additional income of appellant for the year 1944 over and above that reported in the income tax return of appellant for that year [Tr. pp. 953-954].

Samuel J. Phoebus, a witness for the government, is a special agent with the Bureau of Internal Revenue, who investigated the tax return of the appellant for the year 1944, to determine whether or not he had paid the proper tax [Tr. p. 884].

The first time he met appellant was on May 18, 1945, at the plant of the Acme Meat Co., when he spoke to him in connection with such investigation.

Mr. Phoebus could not clearly recall whether or not he told appellant who he was, or showed appellant his identification. He had previously identified himself to other people there in the plant, but not to appellant, and Mr. Phoebus cannot say that he did at any time tell appellant who he was [Tr. pp. 885-886].

Mr. Phoebus was present in November, 1945, when he and Mr. Eustice discussed the matter with appellant, and on that occasion neither Mr. Phoebus nor Mr. Eustice stated to appellant that any statements he might make or disclosures concerning his business might be used against him in a criminal prosecution [Tr. pp. 886-887].

David L. Gorgerty, a government witness, is an insurance broker. He had previously seen Exhibits No. 44 [rec'd in evid., Tr. p. 914] and No. 45 [rec'd in evid., Tr. p. 923]. Exhibit 44 is the insurance policy which Mr. Gorgerty caused to be reissued on April 3, 1944, in lieu of the policy that had previously been issued, at the request of appellant about September or October, 1943. The policy, Exhibit 44, was issued in the name of appellant, doing business as Phillip's Meat Co., and thereafter, on August 1, 1944, the beneficiary was changed by endorsement on the policy [Tr. pp. 909-912].

Sometime in July, 1944, at a plant appellant was operating at 3301 East Vernon Avenue, Mr. Gorgerty had a discussion with appellant respecting the change of beneficiary. Mr. Ormont was present at such conversation and appellant introduced him to Mr. Gorgerty, as his partner,

and informed Mr. Gorgerty that he wanted the fire insurance on the stock changed so that it would cover Mr. Ormont and himself, doing business as Acme Meat Co. [Tr. pp. 912-913].

Exhibit 44 is a true and correct copy of the original policy in the hands of appellant and Sam Ormont, it having been delivered to them [Tr. p. 914].

Exhibit 45 consists of five monthly reports of values for the period May to October, 1944, inclusive, on which the beneficiary reports each month the amount of merchandise and stock on hand, for the purpose of computing the premium for Exhibit 44, which is a monthly reporting fire insurance policy [Tr. pp. 914-915].

Mr. Gorgerty is acquainted with the signature of appellant, and the signature on Exhibit 45 is the signature of appellant. These monthly reports were made out by Mr. Gorgerty, the information appearing thereon having been obtained from appellant. Appellant signed the reports and they were sent to the company by Mr. Gorgerty on or about the date each bears [Tr. pp. 916-917].

The endorsement on the policy to transfer it to Acme Meat Co. was made on May 20, 1944, and the conversation with appellant was had in May, a few days prior to the endorsement, and not sometime in July, as previously stated [Tr. pp. 919-920].

At this conversation appellant told Mr. Gorgerty that he wanted the policy previously issued to Phillip's Meat Co. transferred to the Acme Meat Co. Appellant at that time told Mr. Gorgerty that he and Mr. Ormont were partners, doing business as the Acme Meat Co., in substantially that language [Tr. pp. 925-926].

The typewritten matter that appears on each page of Exhibit 45 was typed in by Mr. Gorgerty, or by someone in the office of Mr. Gorgerty, and at his request. The writing, Acme Meat Co., that appears on the first page of Exhibit 45, and on the line following the typed name "Phillip Himmelfarb, dba," is in Mr. Gorgerty's handwriting. The first page of that exhibit was signed by appellant in blank and delivered to Mr. Gorgerty, who filled in everything which appears on that page. The second, and all subsequent pages of Exhibit 45, were filled in and signed by Mr. Gorgerty, he having signed the name "Phillip Himmelfarb" thereto [Tr. pp. 929-931, incl.]

The figures appearing on that exhibit were either telephoned to Mr. Gorgerty, or obtained by him at the plant, and Mr. Gorgerty at his office filled in all of Exhibit 45, save and except the signature on the first page. Appellant never saw the last four or five sheets that constitute Exhibit 45, and when appellant signed the first sheet it was blank. Appellant signed enough reports in blank for a twelve-month period [Tr. pp. 931-932].

The first page of Exhibit 45 was one of the twelve statements signed in blank by appellant in connection with the policy issued to appellant Phillip Himmelfarb doing business as Phillip's Meat Co. This first page was the only one used of the twelve statements signed in blank by appellant. Mr. Gorgerty did not use the remainder of the twelve statements signed in blank because of the transfer of the policy to Acme Meat Co., but proceeded to sign the reports for appellant in connection with the transferred policy [Tr. pp. 932-933].

The pages comprising Government's Exhibit 45 are the original reports—not carbon copies [Tr. pp. 933-934].

A week or so after the first conversation heretofore alluded to, Mr. Gorgerty had another conversation at the plant with appellant, at which Sam Ormont was also present. At that time appellant told Mr. Gorgerty to sign appellant's reports and send them in because they were too busy. This conversation took place after the policy was transferred from Phillip's Meat Co. to Acme Meat Co. [Tr. pp. 935-937].

The insurance policy, Exhibit 44, is a true copy of the original except that the underwriter has made some notations on it which are not included on the original policy and the words "Sam Ormont", and the line drawn through Phillip's Meat Co., and the name "Acme Meat Co.", written in pencil, are not on the original policy [Tr. pp. 941-943].

The original policy was never delivered to them; it was the rider that was delivered to appellant and Ormont when the policy was transferred to Acme Meat Co. The rider was handed to appellant [Tr. pp. 943-944].

William S. Malin, a witness on behalf of the government, is a certified public accountant and has been since 1928 [Tr. p. 1091]. On July 31, 1945, he sent to Donald Bircher the financial statements, Exhibits 50-A and 50-B, dated July 30, 1945. He saw the signature, Phillip Himmelfarb, affixed to Exhibit 50-B by appellant [Tr. pp. 1112-1116]. The letter, Exhibit 50-D was prepared by Mr. Malin, signed by appellant, and sent to Mr. Bircher by Mr. Malin [Tr. pp. 1117-1118], together with Exhibits 50-A and 50-B [Tr. p. 1122].

The information set forth on Exhibit 50-B was obtained by Mr. Malin from appellant. The cash on hand is the amount he had deposited in the bank, which Mr. Malin

obtained from bank balances; the war bonds were bonds at cost; the four-family flat and all the assets, automobile, truck, adding machine, came from appellant's records; the Acme Meat Co. receivables is what appellant said was receivable from Acme Meat, which Mr. Malin believes was salaries accrued, and the small items were what appellant said he owed [Tr. pp. 1121-1122].

Mr. Malin prepared the original return, of which Exhibit 6 is a copy, and the signature on the last page, William F. Malin, is his—Mr. Malin's signature.

The information "miscellaneous enterprises" inserted in that return, was obtained by Mr. Malin from Mr. Mirman, the attorney [Tr. p. 1126]. Item 12 on the front page of that return, "other income—state nature and sources—miscellaneous income, $71,388.84", was likewise obtained from that attorney [Tr. p. 1127]. The information on the fourth page of that return, "Phillip Himmelfarb—50%—$35,694.42," is according to the statement of appellant that they divided it fifty-fifty [Tr. pp. 1127-1128].

The information, "joint venture", typed in on the fourth page of the return under the section headed "Questions" and after the second item "Nature of organization (partnership, syndicate, pool, joint venture, etc.)" was obtained by Mr. Malin from appellant [Tr. pp. 1128-1129].

The only record Mr. Malin saw with reference to the sums shown on the return, "50 per cent, $35,694.42 to Sam Ormont", and "50 per cent, $35,694.42 to appellant," was a slip of paper seen by Mr. Malin on May 23 [Tr. pp. 1130-1131].

The signatures on Exhibit 6 were placed on the return in Mr. Malin's presence, and the signature, Phillip Him-

melfarb thereon, was signed by appellant [Tr. pp. 1132-1133].

Donald Bircher, a government witness, is and for twenty years has been a special agent in the Bureau of Internal Revenue.

During May, 1945, he was assigned to conduct an investigation of the income tax of Sam Ormont and appellant for the years 1942, 1943 and 1944 [Tr. p. 1134].

Mr. Bircher had previously seen Exhibits 50 A, B and D, and Exhibit 52. These exhibits were received by him by mail from Mr. Malin in the envelope, Exhibit 52. Mr. Bircher had no discussion with appellant respecting those documents [Tr. pp. 1152-1153].

On May 24, 1945, Mr. Bircher spoke to appellant at the Acme Meat Co. plant, told him what he was doing, and showed him his credentials, of which Exhibit 54 is a copy [Tr. pp. 1169-1171].

The government having rested [Tr. p. 1225], and a motion for acquittal having been made [Tr. p. 1225] and granted as to Count I, but denied as to Count II [Tr. p. 1232], appellant proceeded with his defense.

Exhibit GG [rec'd in evid. Tr. p. 1265] is the income tax return filed by appellant for the year 1945, and Exhibit HH [rec'd in evid. Tr. p. 1265], is the income tax return for the calendar year 1945, filed by Ruth Himmelfarb, his wife.

Ralph Kibbee, a witness on behalf of appellant, is and for approximately ten years has been a certified public accountant, licensed to practice in the State of California and before the Treasury Department of the United States. As such certified public accountant he has pre-

pared income tax returns on both a calendar and fiscal year basis, on a cash and accrual basis, and has verified and audited returns prepared by others [Tr. pp. 1267-1268].

Mr. Kibbee has previously seen Exhibits 4, 5, 6, GG and HH [Tr. pp. 1268, 1269].

Mr. Kibbee has recomputed the 1944 return of appellant by allocating a part, to wit: $13,641.11 of the income from the joint venture reported in the 1945 return, Ex. GG, to the 1944 return [Tr. p. 1270]. The amount so added to the 1944 return produced an amount which corresponded to the sum set forth in the Bill of Particulars and in Count II of the indictment as the income of appellant for the year 1944. The total amount of the tax as recomputed and calculated on the basis of the net income as shown on the 1944 return, plus the additional sum of $13,641.11, is $5,843.91 [Tr. pp. 1271-1272].

Mr. Kibbee also recomputed the 1945 return filed by appellant on the basis of the net income as shown by such return, less the sum of $13,641.11, allocated to the year 1944, and the amount of tax for the 1945 return as so recomputed is $1,881.85 [Tr. pp. 1272-1273].

The total amount of the tax for the years 1944 and 1945, shown by the returns filed by appellant for these years is $8,891.97. The total amount of the tax for the years 1944 and 1945 as recomputed by Mr. Kibbee by the addition of the sum of $13,641.11 to the year 1944, and the deduction of that amount from the income for the year 1945, is $7,725.78. The difference in dollars and cents between these two totals is $1166.19, which, with respect to the returns as filed for the years 1944 and 1945, represents an overpayment [Tr. p. 1273].

Substantially the same result is obtained by the recomputation of the returns filed for Ruth Himmelfarb, utilizing the same methods of allocation and calculation, and the total overpayment for both appellant and Ruth Himmelfarb, his wife, would be approximately double the amount of $1166.19 [Tr. pp. 1273-1274].

Mr. Kibbee recomputed the returns for the calendar years 1944 and 1945 utilizing a sum as an addition to the 1944 and a deduction from the 1945 income, other than and different from the amount used in the aforementioned computation, to wit: $11,979.63, representing 245/365 of appellant's share of the profits of the joint venture [Tr. p. 1276]. That fraction represents the number of days of the joint venture falling within the calendar year 1944, 120/365 days falling within the calendar year 1945 [Tr. p. 1275].

The amount of the 1944 tax, as recomputed on the fractional share basis is $5005.59 for 1944 and $2454.39 for 1945, resulting in a total for those years, as recomputed on the fractional share basis, of $7459.98 [Tr. p. 1276].

The difference between such total and the total tax for 1944 and 1945, shown by the returns filed for said years, is $1431.99, which, with respect to the returns filed for those years, represents an overpayment [Tr. pp. 1276-1277].

Substantially the same result is obtained by the recomputation on the fractional share basis of the returns filed by Ruth Himmelfarb [Tr. p. 1277].

The total payment by both appellant and his wife, on the basis of such recomputation, is substantially double the sum of $1431.99 [Tr. p. 1277].

Appellant and his wife have paid the tax shown to be due by the 1944 and 1945 returns [Tr. pp. 1280-1281].

Mr. Kibbee was first retained in connection with this case the day before he appeared and testified. His calculations were based upon Government's Exhibits 4, 5, 6 and Defendant's Exhibits GG and HH. He did not have any discussions regarding these matters with appellant, or Mrs. Ruth Himmelfarb, and does not know of his own knowledge whether any of the figures or statements in those returns are or are not true. He accepted them as shown and assumed them to be true and correct because they were so reported. Mr. Kibbee simply did a mathematical calculation based upon the assumptions indicated by him. In his schedules and in his testimony he assumed that if certain sums were taken from the 1945 reported income and added to the 1944 income, a different result would be obtained. He does not know whether any of the sums came from one year or the other, and based his answer on the returns themselves [Tr. pp. 1282-1283].

The division of the income on the basis of 245/365 is not an arbitrary division, but is an accepted manner of dividing income where the details are unknown. Mr. Kibbee's computation as to how much tax was overpaid or underpaid, as well as other matters testified to by him, assume certain matters to be true, of which he has no personal knowledge [Tr. p. 1283].

If the sum of $11,979.63 is allocated to the year 1944 as earned in that year and added to the amount of $4611.54 appellant reported for that year, then the amount which should have been reported for 1944 is $16,591.17, and the tax which should have been reported and paid, based upon the assumption that such are the amounts that appellant earned in 1944, would have been $5005.59, and the same or almost the same amount would have been reported and paid by Ruth Himmelfarb [Tr. p. 1285].

Mr. Kibbee's computations were all made on the community basis, allocating half to Mrs. Himmelfarb and half to appellant [Tr. p. 1286].

Joe Abrams, a salesman, Pete Bedder, engaged in the life insurance business, Frederick L. Rey, an insurance broker, Louis Vincent, and Chauncy Bowlus Chauncy, called as witnesses on behalf of appellant, have known appellant for periods varying from 3 or 4 to 15 years, have transacted business with him, which transactions involve the payment of bills and indebtedness, and have transacted business with other persons who have transacted business with appellant. Each of these men know appellant's reputation in the community in which appellant lives, for truth, honesty and integrity, and for paying his bills and meeting his obligations; and appellant's reputation is very good.

The foregoing is believed to be a full, fair and complete statement of all of the pertinent evidence offered and received against and on behalf of appellant, delineated from the record in this case.

Statement of Questions Involved.

I. Is there substantial evidence against appellant to support the verdict of the jury and the judgment entered thereon?

II. Did the trial court err in denying appellant's motions for an acquittal of the offense charged against him in Count II of the indictment made at the close of the government's case, and the motion for such acquittal made at the close of all of the evidence?

III. Did the trial court err in admitting in evidence, over appellant's objection:

(a) Exhibit 34;
(b) Exhibit 35;
(c) Exhibit 36A;
(d) Exhibit 50A; and
(e) Exhibit 50B,

and in denying appellant's motion to strike from the record:

(a) Exhibit 32;
(b) Exhibit 34;
(c) Exhibit 35; and
(d) Exhibit 36A?

IV. Was counsel for the government guilty of misconduct:

(a) In making repeated references in his opening and closing argument to the jury of other alleged crimes and offenses purportedly committed by appellant, of which there was no evidence against appellant, and by repeatedly stating to the jury that the sources of the income upon which appellant allegedly

attempted to evade income taxes was overcharges, side payments and extra payments unlawfully collected and received in connection with the sale of meat, notwithstanding the fact that there was no evidence against appellant showing that such income or any income received by him was received from overcharges, side payments, or extra payments received in connection with the sale of meat, or in any other unlawful transactions; and

(b) In stating to the jury that witnesses not called by appellant were accessible and available to him, and stating or inferring that if appellant was innocent such witnesses would have been called by him, and that the reason such witnesses were not called was that the testimony of such witnesses would be adverse to appellant.

V. Did the trial court err in refusing to charge the jury as requested by appellant in his proposed Instructions to the Jury:

(a) No. 17;

(b) No. 22;

(c) No. 25;

(d) No. 27;

(e) No. 29;

(f) No. 30; and

(g) No. 35?

VI. Did the trial court err in denying appellant's motions for an acquittal notwithstanding the verdict of the jury, and in the alternative, for a new trial?

Specification of Assigned Errors Relied Upon.

Specification of Error No. I—

(Assignment of Error Nos. 1, 2, 3, 4 and 5.)

The evidence against appellant is manifestly insufficient to support the verdict of the jury and the judgment entered thereon, and such verdict and judgment are contrary to law and the evidence [Specs. 1, 2, 3, 4 and 5; Tr. pp. 1630-1631];

Specification of Error No. II—

(Assignment of Error Nos. 6 and 7.)

The trial court erred in denying appellant's motions for an acquittal of the offense charged against him in Count II of the indictment made at the close of the government's case [Tr. pp. 1225, 1232], and at the close of all the evidence [Tr. pp. 1352, 1363; Specs. 6 and 7; Tr. p. 1631];

Specification of Error No. III—

(Assignment of Error Nos. 9 and 10.)

The trial court erred in admitting, over appellant's objection, Exhibits 34, 35, 36A [Tr. pp. 385-386], 50A and 50B [Tr. pp. 1108, 1109, 1112, 1114], and in denying appellant's motion to strike from the record Exhibits 32, 34, 35, 36A [Tr. pp. 1363-1367, incl.] 44 and 45 [Tr. pp. 946-947; Specs. 9 and 10; Tr. p. 1631];

Specification of Error No. IV—

(Assignment of Error Nos. 11 and 12.)

Counsel for the government was guilty of misconduct in addressing improper argument to the jury [Specs. 11 and 12; Tr. p. 1632];

Specification of Error No. V—

(Assignment of Errors Nos. 13 and 14.)

The trial court erred in refusing to charge the jury as requested by appellant in this proposed Instructions No. 17 [Tr. pp. 112, 1442], No. 22 [Tr. pp. 113, 1443], No. 25 [Tr. pp. 123, 1443], No. 27 [Tr. pp. 114, 1443], No. 29 [Tr. pp. 124, 1443], No. 30 [Tr. pp. 125, 1443], and No. 35 [Tr. pp. 126, 1444; Specs. 13 and 14; Tr. p. 1663].

Specification of Error No. VI—

(Assignment of Error No. 8.)

The trial court erred in denying appellant's motions for an acquittal notwithstanding the verdict of the jury, and in the alternative, for a new trial [Tr. pp. 134, 135, 1608; Spec. 8; Tr. p. 1631].

ARGUMENT.

SPECIFICATION OF ERROR NO. I.

The Evidence Against Appellant Is Manifestly Insufficient to Support the Verdict of the Jury and the Judgment Entered Thereon, and Such Verdict and Judgment Are Contrary to Law and the Evidence.

Appellant in his statement of the facts of this case was mindful of the rule that the evidence must be viewed in the light most favorable to the government. Similarly, appellant in asserting the complete insufficiency of the evidence to sustain the verdict, is mindful of the fact that when so viewed there must be an absence of substantial evidence to support the finding. However, where, as in the instant case the verdict of the jury is without evidentiary support the judgment will be reversed.

U. S. v. Schachtrup, 7th Cir. (1944), 140 F. (2d) 415, 418;

Strickland v. U. S., 5th Cir. (1946), 155 F. (2d) 167, 168;

Edenfield v. U. S., 5th Cir. (1940), 112 F. (2d) 931, 932;

Mortensen v. U. S. (1944), 322 U. S. 369, 374;

U. S. v. Wishnatzki, 2nd Cir. (1935), 77 F. (2d) 357, 360;

Dahly v. U. S., 8th Cir. (1931), 50 F. (2d) 37, 46;

Wiborg v. U. S. (1896), 163 U. S. 632.

Again, where as in the instant case, all the evidence adduced against appellant is as consistent with innocence as with guilt, it is the duty of this court to reverse the judgment against him.

Graceffo v. U. S., 3rd Cir. (1931), 46 F. (2d) 852, 853;

Karchmer v. U. S., 7th Cir. (1932), 61 F. (2d) 623;

Yoffe v. U. S., 1st Cir. (1946), 153 F. (2d) 570, 572, 573;

U. S. v. Tatcher, 3rd Cir. (1942), 131 F. (2d) 1002, 1003;

Hammond v. U. S., C. A. D. C. (1942), 127 F. (2d) 752, 753;

Neal v. U. S., 8th Cir. (1939), 102 F. (2d) 643, 648.

Evidence which is consistent with two conflicting hypothesis tends to prove neither.

Neal v. U. S., 8th Cir. (1939), 102 F. (2d) 643, 648;

Gunning v. Cooley (1930), 281 U. S. 90, 94; 50 S. Ct. 231; 74 L. Ed. 720;

Stevens v. The White City (1932), 285 U. S. 195, 204; 52 S. Ct. 347; 76 L. Ed. 699;

Svenson v. Mutual Life Ins. Co. of New York, 8th Cir. (1937), 87 F. (2d) 441, 443.

And proof of circumstances even though consistent with guilt but which are not inconsistent with innocence will not support a conviction.

Spalitto v. U. S., 8th Cir. (1930), 39 F. (2d) 782, 784;

Van Gorda v. U. S., 8th Cir. (1927), 21 F. (2d) 939, 942;

Cravens v. U. S., 8th Cir. (1932), 62 F. (2d) 261, 274;

McClintock v. U. S., 10th Cir. (1932), 60 F. (2d) 839, 842.

With the foregoing principles as our criteria, we proceed to evaluate the evidence in the record against appellant to determine if there is any substantial evidence therein which excludes every other hypothesis than that appellant attempted to evade the payment of income tax due and owing by him for the year 1944.

Directing our attention first to the testimony, and secondly to the exhibits adduced against appellant, we find:

(1) The first witness through whom any testimony was offered and received against appellant was Hugh R. Pingree, the branch manager of the Bank of America [Tr. p. 380]. He merely identified records of the commercial account maintained by appellant at that bank [Tr. pp. 383, 385, 386].

Neither Mr. Pingree nor any other witness at any time testified respecting the information contained on or the transactions reflected by the bank records, identified by Mr. Pingree, offered and received in evidence.

The utter failure of the government in any way to connect these exhibits, as well as other exhibits offered and received against appellant, with the offense charged against him, will be subsequently discussed and elaborated upon in this brief. It is sufficient at this point, however, to note that the testimony of Mr. Pingree did not adduce one single fact proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(2) The second witness through whom any testimony was offered and received against appellant was Ernest Link [Tr. p. 393]. The sum and substance of his testimony was that he saw appellant working on the premises of the Acme Meat Co. performing services pertaining to

the business of that company [Tr. pp. 429, 430, 431]. This fact, either standing alone or when added to the testimony of Mr. Pingree, does not result in the establishment of a single circumstance proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(3) The third witness through whom any testimony was offered and received against appellant was J. Bryant Eustice. He, in essence, stated that as an agent for the Bureau of Internal Revenue, he was assigned to make an investigation of appellant's income tax returns [Tr. pp. 507, 508] and in connection therewith examined the books and records of Acme Meat Co., made a transcript of certain accounts therein [Tr. pp. 517-519], and discussed with appellant his relationship to that company [Tr. pp. 887-888].

It is submitted that the testimony of Mr. Eustice, either standing alone or when added to the preceding testimony of Mr. Link and Mr. Pingree, does not result in the development of a single fact which proves or tends to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(4) The fourth witness through whom any testimony was offered and received against appellant was Samuel J. Phoebus. He testified that as a special agent of the Bureau of Internal Revenue, he investigated the income tax return of appellant for the year 1944 [Tr. p. 884]; that he met appellant on May 18, 1945, at the Acme Meat Co., spoke to him on that day, and on May 23, 1945, in connection with such investigation [Tr. pp. 884-885].

It is self-evident that this testimony, either standing alone, or when added to the testimony of the three pre-

ceding witnesses, Mr. Eustice, Mr. Link and Mr. Pingree, does not present a scintilla of evidence proving or tending to prove that appellant attempted to evade the payment of any income tax due or owing by him for the year 1944.

(5) The fifth witness through whom any testimony was offered and received against appellant was David L. Gorgerty, the insurance broker. He merely identified the insurance policy, Exhibit 44, and the monthly reports, Exhibit 45, and testified that appellant introduced Sam Ormont to him as appellant's partner [Tr. pp. 909-914].

It cannot be gainsaid that this testimony standing alone, or when added to the preceding testimony adduced against appellant, does not establish one solitary fact proving or tending to prove that appellant attempted to evade the payment of any income tax due or owing by him for the year 1944.

(6) The sixth witness through whom any testimony was offered and received against appellant was William S. Malin, a certified public accountant.

The import of his testimony is that appellant signed the financial statement, Exhibit 50-B [Tr. pp. 1112-1116], and the letter, Exhibit 50-D [Tr. pp. 1117-1118], which together with the unsigned financial statement, Exhibit 50-A, were sent by Mr. Malin to Mr. Donald Bircher on July 31, 1945 [Tr. pp. 1112, 1115, 1118]; and the information set forth on Exhibit 50-B was obtained by Mr. Malin from appellant and appellant's records [Tr. pp. 1121, 1122]. Mr. Malin prepared the information return, of which Exhibit 6 is a copy, and the information thereon came in part from appellant and in part from Mr. Mirman, an attorney [Tr. pp. 1125-1128].

It is self-evident that the testimony of this witness, as distinguished from what may be established by the documents identified by him which will hereinafter be separately analyzed, either standing alone or when added to the testimony of the preceding witness, does not result in an iota of evidence proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(7) The seventh and final witness through whom any testimony was offered and received against appellant, was Donald A. Bircher, a special agent in the Bureau of Internal Revenue, who averred that he was during May, 1945, assigned to conduct an investigation of the income tax of appellant for the years 1942, 1943 and 1944 [Tr. p. 1134], and that he, Mr. Bircher, received the documents, Exhibits 50-A, 50-B and 50-D, by mail from Mr. Malin, but had no discussion with appellant respecting those documents [Tr. pp. 1152, 1153].

It is clear that the testimony of Mr. Bircher, either standing alone or when added to the testimony of the preceding witnesses, does not create a single circumstance proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

It therefore is obvious that any substantial evidence that the appellant committed the offense of which he was convicted, if such evidence exists at all, must be found in the exhibits offered and received against him.

We, therefore, proceed to analyze each of such exhibits to determine if such documents contain or comprise such evidence.

These exhibits, totalling fourteen in number, will be considered individually and collectively in the light of all of the testimony in the record against appellant, narrated in the Statement of Facts set forth herein, as well as set forth in the preceding portion of this discussion evaluating such testimony.

(1) Exhibit No. 4, the first exhibit offered and received against appellant, is the Individual Income Tax Return filed by appellant for the calendar year 1944 [Tr. p. 345]. Not one word of testimony was given by any government witness respecting this exhibit.

Exhibit 4 does not in any way disclose that appellant, during that calendar year, received any income in addition to or in excess of the income reported in such return; it does not in any way indicate that the gross income and taxable net income therein declared was not the true and correct gross and taxable net income of appellant for the calendar year 1944; nor does it in any way appear from that exhibit that the income tax reported and paid by him for the calendar year 1944 was not the income tax which was due and owing by appellant for that year.

In short, Exhibit 4 does not in and of itself give rise to a single fact proving or tending to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(2) Exhibit No. 5 was the second exhibit offered and received against appellant. It is the Individual Tax Return filed for the calendar year 1944 by Ruth Himmelfarb, the wife of appellant [Tr. p. 345]. Exhibit 5 is the counterpart of appellant's return, and what has been said in the preceding paragraphs respecting Exhibit 4 applies with equal force to this exhibit.

Exhibit 5 in and of itself does not, standing alone or in conjunction with Exhibit 4, prove or tend to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(3) Exhibit No. 6, the third exhibit offered and received against appellant [Tr. p. 383], is a Partnership Information Return filed by appellant and Sam Ormont, as joint venturers, for the fiscal period May 1, 1944, to April 30, 1945, inclusive. It discloses a total net income of $71,388.84 for appellant and Sam Ormont, as joint venturers, during that fiscal period, distributed equally to them.

The only testimony given against or for appellant by any government witness respecting this exhibit was the testimony of William Malin [Tr. pp. 1125-1128], heretofore narrated.

Exhibit 6 does not in any way indicate or disclose that appellant received any income in the calendar year 1944 which was not reported by him in the income tax return, Exhibit 4, for that calendar year. The income of appellant from the joint venture declared in the information return, Exhibit 6, was reportable by appellant, and the income tax thereon was payable on or before the 15th day of March of the calendar year following the calendar year in which such fiscal year ended.

> Internal Revenue Code, Sec. 188, 26 U. S. C. A. 188.

The fiscal period for which the information return, Exhibit 6, was filed, having ended on April 30, 1945, the income distributable to appellant for such period was reportable and the income tax thereon was payable on or before March 15, 1946. Appellant did so report such in-

come [Ex. GG, Tr. p. 1265], and paid the tax thereon [Tr. pp. 1280-1281].

Exhibit 6 does not, alone or in conjunction with Exhibits 4 and 5, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(4) Exhibit No. 32, the next and fourth exhibit offered and received against appellant [Tr. p. 386], is a signature card for the commercial account opened and maintained by appellant, since 1942, at the Bank of America, First and Chicago branch, Los Angeles, California [Tr. pp. 380-383].

Not a single word of testimony was given by any witness respecting this exhibit, save and except the identification thereof by Hugh Pingree, the branch bank manager [Tr. pp. 380-383]. No attempt was ever made by the government to connect this exhibit with the offense charged against appellant, which fact will be separately discussed and more fully treated in a subsequent portion of this brief in connection with another assignment of error. Suffice to state at this point that appellant has been at a complete loss to understand the purpose, significance or relationship of this exhibit to this case and the offense charged against him.

It is self-evident that Exhibit 32 does not, alone or in conjunction with Exhibits 4, 5, and 6, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(5) Exhibit No. 34, the next and fifth exhibit offered and received against appellant [Tr. p. 386], is an application by Ruth Himmelfarb, dated January 20, 1945,

for a cashier's check, payable to the order of Acme Meat Co., in the sum of $3150.00.

What has heretofore been said respecting Exhibit 32 applies with equal vigor to Exhibit 34, and this exhibit likewise does not, alone or in conjunction with Exhibits 4, 5, 6 and 32, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(6) Exhibit No. 35, the sixth exhibit offered and received against appellant, is the cashier's check payable to Acme Meat Co., in the amount of $3150.00, issued on January 20, 1945, pursuant to the application of Ruth Himmelfarb aforementioned [Tr. p. 386].

What has heretofore been said in the preceding paragraphs respecting Exhibits 32 and 34 applies *in toto* to Exhibit 35, and this exhibit too does not, alone or in conjunction with Exhibits 4, 5, 6, 32 and 34 prove, or tend to prove, that appellant attempted to evade any income tax due or owing by him for the year 1944.

(7) Exhibit No. 36A, the seventh exhibited offered and received against appellant [Tr. pp. 386, 557], is comprised of a number of ledger sheets of the commercial account of appellant at the aforementioned branch bank for the period from December 24, 1943, to March 22, 1945.

What has heretofore been said in the preceding paragraphs respecting Exhibits 32, 34 and 35, applies completely and precisely to Exhibit 36A, and this exhibit does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34 and 35, prove or tend to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(8) Exhibit No. 44, the next and eighth exhibit offered and received against appellant [Tr. p. 914], is the insurance policy transferred by endorsement from appellant, doing business as Phillip's Meat Co., to appellant and Sam Ormont, doing business as Acme Meat Co. [Tr. pp. 912-913].

It is hardly necessary to labor the point that the transfer by endorsement of an insurance policy, whether properly or improperly caused to be made or done, does not constitute the offense denounced by Section 145(b) of the Internal Revenue Code, and that Exhibit 44 does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35 and 36A, prove or tend to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(9) Exhibit No. 45, the ninth exhibit offered and received against appellant [Tr. p. 923], is comprised of five monthly reports made in connection with the insurance policy, Exhibit 44 [Tr. pp. 914, 915]. Each of these monthly reports was completely filled in by Mr. Gorgerty, and with the exception of the first report, signed by appellant in blank, were signed by Mr. Gorgerty, who, pursuant to instructions from appellant so to do, signed appellant's name thereto [Tr. pp. 928-933].

It is again obvious that these reports, Exhibit 45, is no more efficacious in establishing a violation of the offense herein charged against appellant than is the insurance policy, Exhibit 44, and that Exhibit 45 does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A and 44, prove or tend to prove that appellant attempted to evade any income tax due or owing by him for the year 1944.

(10) The next exhibits, the tenth and eleventh offered and received against appellant, are EXHIBITS No. 50A and No. 50B [Tr. p. 1116]. These two exhibits are treated herein as one and discussed together because they are identical statements of the net worth of appellant as of April 30, 1945, except that No. 50A is unsigned, whereas No. 50B bears the signature of appellant, preceded by the phrase: "The above statement is correct to the best of my knowledge and belief."

The only testimony respecting the contents of this statement was given by William Malin, a government witness, who testified that the amount shown thereon as cash on hand, in banks, was obtained by him from bank balances, and the other items shown on that exhibit were obtained from appellant's records, or based upon what appellant told him [Tr. pp. 1121-1122].

No attempt was made by the government to show that this statement of net worth, Exhibits 50A and 50B, was incorrect or untrue, or that any part or portion of appellant's assets or liabilities, as of April 30, 1945, represented income of appellant for the year 1944 in excess of the amount reported by and upon which the tax was paid for said year. Nor was any effort whatever made by the government to establish any connection between the statement of appellant's net worth as of April 30, 1945 or any of the assets or liabilities therein set forth, and the offense of which appellant stood accused.

It is axiomatic that a statement of net worth does not raise a presumption or create an inference that income was received in any given year, and certainly no presumption or inference that any income which may have been

received in any given year was in excess of the amount reported by the taxpayer for such year.

Exhibits 50A and 50B, standing alone or in conjunction with Exhibits, 4, 5, 6, 32, 34, 35, 36A, 44 and 45, did not prove or tend to prove that appellant attempted to evade any income tax due and owing by him for the year 1944.

(11) Exhibit No. 50D, the twelfth exhibit offered and received against appellant [Tr. pp. 1118-1119], is a letter dated July 30, 1945, signed by appellant and addressed to Donald Bircher, Special Agent of the Bureau of Internal Revenue.

Mr. Bircher was therein advised by appellant that the total amount received by appellant from the joint venture was $35,694.42; that a cumulative record only was kept of the amounts received, and that the profits were distributed at irregular intervals.

This amount of $35,694.42, it will be observed, was the precise amount shown by Exhibit 6, as distributed or distributable to appellant for the fiscal period May 1, 1944 to April 30, 1945, inclusive, and is the precise sum reported by and included as income in the individual income tax return filed by appellant for the calendar year 1945, Exhibit GG [Tr. p. 1270].

Exhibit 50D does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A and 50B, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(12) Exhibit No. 52 the thirteenth exhibit offered and received against appellant, is simply the envelope in which Mr. Malin mailed to Mr. Donald Bircher the Exhibits 50A, 50B and 50D [Tr. pp. 1152-1153].

It is wholly without significance and is mentioned here solely for the purpose of noting every bit of evidence in the record against and for appellant.

Exhibit 52 does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B and 50D prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

(13) Exhibit No. 54, the last exhibit offered by the government and received against appellant, is a copy of the credentials of Donald O. Bircher, Special Agent of the Bureau of Internal Revenue.

What has been said in the preceding paragraph respecting Exhibit 52 is entirely applicable to this exhibit, and Exhibit 54 does not, alone or together with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B, 50D and 52, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

Exhibit GG, the first exhibit offered by and on behalf of appellant, and the sixteenth exhibit of the total number of exhibits offered against and for appellant [Tr. p. 1265], is the individual income tax return of appellant for the calendar year 1945.

Not a single word of testimony was given by any government witness respecting this exhibit, and the only testimony with respect thereto was given by Mr. Ralph

Kibbee, the certified public accountant, who detailed the computations made by him regarding this exhibit and Exhibits 4 and 5.

This exhibit does not in any way disclose that the gross or taxable net income reported by appellant in the return filed by him for the calendar year 1944, Exhibit 4, was not the true and correct gross and taxable net income reportable by appellant for the year 1944, nor does Exhibit GG in any way indicate that appellant, during the calendar year 1944, received any income in addition to or in excess of the income reported in his return for such calendar year, Exhibit 4, or that the income tax reported and paid by appellant for the calendar year 1944 was not the true and correct tax which was due and owing by him for that year.

In brief, Exhibit GG does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B, 50D, 52, and 54, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

Exhibit HH, the second exhibit offered by and on behalf of appellant, and the seventeenth exhibit of the total number of exhibits offered against and for appellant [Tr. p. 1265], is the individual income tax return filed for the calendar year 1945 by Ruth Himmelfarb.

Exhibit HH is the counterpart of appellant's return, Exhibit GG, and what has been said in the preceding paragraph respecting Exhibit GG, applies fully to this exhibit.

Exhibit HH does not, alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B, 50D, 52, 54, and GG, prove or tend to prove that appellant

attempted to evade any part of the income tax due or owing by him for the year 1944.

The third exhibit, numbered Exhibit II, offered and received by and on behalf of appellant, and the eighteenth and last of the total number of all exhibits received for and against appellant, is comprised of a series of checks payable and paid to the Collector of Internal Revenue for the income tax due and owing for the calendar year 1944, as shown by Exhibits 4 and 5.

Exhibit II does not, standing alone or in conjunction with Exhibits 4, 5, 6, 32, 34, 35, 36A, 44, 45, 50A, 50B, 50D, 52, 54, GG and HH, prove or tend to prove that appellant attempted to evade any part of the income tax due or owing by him for the year 1944.

It thus becomes crystal clear from the analysis of all of the evidence in the record, both the testimony and the exhibits offered and received against and for appellant, viewed in the light most favorable to the government, that there is a complete absence of any substantial evidence to support the finding that appellant was guilty of the offense charged in Count II of the indictment.

It must be remembered that not only must the evidence show that appellant attempted to evade a substantial part of the income tax due and owing by him for the year 1944, but there must be substantial evidence that such attempt was willful.

> "It has always been the law (unless otherwise prescribed by statute) that to convict one of crime requires the proof of an intention to commit a crime."
>
> *Nosowitz v. U. S.*, 2nd Cir. (1922), 282 Fed. 575, 578.

The statute which appellant was charged to have violated, to-wit: Section 145(b), Internal Revenue Code, 26 U. S. C. A. 145(b), by its express language makes willfulness one of the essential elements of the offense. It provides, in so far as is material here,

> ". . . Any person who *willfully* attempts in any manner to evade or defeat any income tax imposed by this chapter shall, in addition to other penalties provided by law, be guilty of a felony . . ."

It has been repeatedly held that a willful intent is one of the essential elements in the proof of the crime of evasion of federal income taxes.

U. S. v. Zimmerman, 7th Cir. (1939), 108 F. (2d) 370, 374;

Malone v. U. S., 7th Cir. (1938), 94 F. (2d) 281, 286;

Hargrove v. U. S., 5th Cir. (1933), 67 F. (2d) 820, 823;

Heindel v. U. S., 6th Cir. (1945), 150 F. (2d) 493, 496, 497.

Not only is the record in this case against appellant wholly barren of any substantial evidence that he attempted to evade any part of the income tax due and owing by him for the year 1944, but it is completely devoid of any evidence that appellant willfully attempted so to do.

This Court is weighed with the responsibility of examining all the evidence to determine where in this record

there is substantial evidence offered and received against appellant that he violated the statute in question.

> *U. S. v. Wise,* 7th Cir. (1939), 108 F. (2d) 379, 383.

To paraphrase the language of the court in *Karchmer v. U. S.,* 7th Cir. (1932), 61 F. (2d) 623, at least the evidence against appellant in this case was, to put it conservatively, not less consistent with innocence than with an attempt to evade the payment of taxes.

In the words of the Court in *Candler v. U. S.,* 5th Cir. (1944), 146 F. (2d) 424, 426:

> "The evidence is as consistent with innocence as with guilt, and fails signally to show *willful intent,* and we are not willing to convict the defendant on the evidence as disclosed by the record here."

This Court, after a consideration of the facts in the record against appellant in this case, must inevitably be led to say, as was said by the Court in *Williams v. U. S.,* C. A. D. C. (1944), 140 F. (2d) 351, 352:

> "Accordingly, we have read the testimony and reach the conclusion that to permit the conviction to stand would result in a miscarriage of justice. To sustain it we should have to find, at least, that the evidence is more consistent with guilt than with innocence. Considered from that aspect we are of the opinion that not enough is shown."

SPECIFICATION OF ERROR NO. II.

The Trial Court Erred in Denying Appellant's Motions for an Acquittal of the Offense Charged Against Him in Count II of the Indictment Made at the Close of the Government's Case and at the Close of All the Evidence.

At the close of the government's case, appellant moved the court to acquit him of the offense charged against him in both Counts I and II of the indictment [Tr. p. 1225]. The motion so made was granted as to Count I and denied as to Count II [Tr. p. 1232].

At the close of all the evidence, appellant renewed his motion for an acquittal as to Count II of the indictment [Tr. p. 1352]. This motion too was denied [Tr. p. 1363].

It has been held by a long line of decisions that unless there is substantial evidence of facts which exclude every other hypothesis than guilt, it is the duty of the trial judge to acquit the defendant, and where all the evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a judgment against the accused.

Graceffo v. U. S., 3rd Cir. (1931), 46 F. (2d) 852, 853;

Nicola v. U. S., 3rd Cir. (1934), 72 F. (2d) 780, 786;

Yoffe v. U. S., 1st Cir. (1946), 153 F. (2d) 570, 572, 573;

Nosowitz v. U. S., 2nd Cir. (1922), 282 Fed. 575, 578.

It has heretofore been established that the evidence offered and received against and for appellant was entirely consistent with his innocence, and that there is a complete absence of any substantial evidence to support his conviction.

The trial court erroneously denied that motion made by appellant for an acquittal of the offense charged against him in Count II of the indictment, an error which this Court must notice and correct.

U. S. v. Wishnatzki, 2nd Cir. (1935), 77 F. (2d) 357, 360.

SPECIFICATION OF ERROR NO. III.

The Trial Court Erred in Admitting, Over Appellant's Objection, Exhibits 34, 35, 36A, 44, 45, 50A and 50B, and in Denying Appellant's Motion to Strike From the Record Exhibits 32, 34, 35 and 36A.

Exhibits 32, 34, 35 and 36A were offered by the government and received in evidence by the Court upon the statement and assurance of government counsel that said exhibits would be "connected" or "tied up" [Tr. pp. 384-386, incl.]. At the time Exhibits 34, 35 and 36A were offered in evidence, appellant interposed the objection that said exhibits pertained to a period beyond the year (1944), involved in the offense charged and were not within the issues [Tr. pp. 385-386].

Exhibit 32, the signature card of appellant for the commercial account maintained by him, Exhibit 34, the application of Ruth Himmelfarb, dated January 20th, 1945, for a cashiers check to Acme Meat Co., in the amount of $3150.00 could only become relevant to and material, or be "connected" with the offense charged

against appellant if it were shown that such bank account and cashiers check, issued pursuant to the application, Exhibit 34, were relevant to and connected with the offense charged against appellant. This, as will be seen, was never done.

Exhibit 35, the cashiers check, dated January 20, 1945, payable to Acme Meat Co., in the amount of $3150.00, issued pursuant to the aforementioned application, could only become material and relevant to, or be "connected" with the offense charged against appellant if it were shown that: (a) the funds with which the cashiers check was purchased were the funds of appellant; (b) which constituted or represented income for the calendar year 1944; and (c) upon which appellant had paid no income tax. This was never done. No attempt was made by the government so to do.

As heretofore pointed out by appellant, not a single word of testimony was given by any witness respecting this check, the source of the proceeds with which it was purchased, the time at which, the person by whom, or the manner in which such proceeds were acquired.

This court will search the record herein in vain for a solitary particle of evidence respecting this exhibit.

Had Exhibit 35 been a cashiers check payable to appellant instead of a cashiers check issued by or for him, it would, at best, be of questionable significance, for even under those circumstances, the bare fact that a taxpayer received and cashed a check for a substantial amount would not in and of itself suffice to establish that income tax was due on account of it.

> *Gleckman v. U. S.*, 8th Cir. (1935), 80 F. (2d) 394, 399.

But, where, as here, a taxpayer issues or causes a check to be issued to another, it is wholly without relevancy. Such a payment does not and cannot constitute income and no income tax does or can become due by reason of such payment.

Exhibit 36A, comprised of a number of ledger sheets of the commercial account of appellant for the period December 23, 1943 to March 22, 1945, incl., could only become material, relevant to and "connected" with the offense charged against appellant if it were shown that: (a) the money deposited therein was income of appellant; (b) for the year 1944; and (c) upon which appellant had paid no income tax. This too was never done; no attempt was made by the government so to do. Not a single word of testimony was given by any witness respecting this exhibit, the source or nature of the funds deposited therein, the time they were acquired, or any other facts respecting the deposits to, the withdrawals from, or balances in said account. This court will search this record in vain for a solitary particle of evidence respecting this exhibit.

The bare fact standing alone that appellant has from time to time deposited money in a bank account does not prove that such deposits were income, or that he owed a tax thereon.

> *Gleckman v. U. S.*, 8th Cir. (1935), 80 F. (2d) 394, 399.

At the close of all of the testimony appellant moved the court to strike from the records Exhibits 32, 34, 35, and 36A [Tr. pp. 1363-1367]. This motion was made upon the grounds that said exhibits were not in any way

connected with this case; no foundation was laid for them; they covered periods prior and subsequent to the period involved in this proceeding; were not within the issues, and no showing had been made that they related in any way to appellant's income or income tax [Tr. pp. 1363-1367]. The motion to strike said exhibits was denied by the Court. In so doing the Court erred.

Evidence which has no bearing on the matters in issue should be excluded.

Nicola v. U. S., 3rd Cir. (1934), 72 F. (2d) 780, 782, 783;

Caughman v. U. S., 4th Cir. (1919), 258 F. (2d) 434, 435, 436;

Nigro v. U. S., 8th Cir. (1941), 117 F. (2d) 624, 631, 632;

Meyers v. U. S., 9th Cir. (1945), 147 F. (2d) 663, 666, 667.

A judgment will be reversed where irrelevant evidence prejudicial to the accused was admitted.

Meyers v. U. S., 9th Cir. (1945), 147 F. (2d) 663, 666, 667;

Nicola v. U. S., 3rd Cir. (1934), 72 F. (2d) 780, 782, 783;

Nigro v. U. S., 8th Cir. (1941), 117 F. (2d) 624, 631.

The admission of bank records without any evidence connecting same with the offense charged is error.

Kittrell v. U. S., 10th Cir. (1935), 79 F. (2d) 259, 262;

Williams v. U. S. (1897), 168 U. S. 382, 395, 396, 397.

The admission of bank records without any evidence connecting same with the offense charged is reversible error where accused may have been prejudiced thereby.

Williams v. U. S. (1897), 168 U. S. 382, 395, 396, 397.

The prejudice resultant to appellant from the admission of these exhibits and the refusal of the court to strike them was enhanced by the fact that the jurors were permitted by the court to take all of the exhibits to the jury room [Tr. p. 1591], and aggravated by the argument to the jury by counsel for the government respecting these exhibits pertaining to appellant's bank account.

Mr. Strong, counsel for the government, in his opening argument stated to the jury [Tr. p. 1493]:

> "Besides that, you have in evidence here the bank records of Mr. Himmelfarb, which show you how much money got into his bank account."

And in his closing argument [Tr. p. 1559]:

> ". . . How about his bank account. That is in evidence. Of course nobody testified as to those books. If the books show on their face what they purport to show, if the records are clear, you can't have testimony. The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case."

Guilt may not be established by speculation or conjecture.

Karchmer v. U. S., 7th Cir. (1932), 61 F. (2d) 623;

Kassin v. U. S., 5th Cir. (1937), 87 F. (2d) 183, 184;

Denner v. U. S., 6th Cir. (1945), 147 F. (2d) 286.

Notwithstanding this basic and salutary rule of law, the jury was invited to assume that appellant received income and evaded the payment of tax thereon merely because the exhibits herein discussed "which show you how much money got into his (appellant's) bank account" were admitted in evidence even though "of course nobody testified as to those books." (Parenthesis ours.)

Exhibit 44 is the insurance policy and Exhibit 45 is the monthly reports made in connection with such policy, as hereinbefore stated. Prior to the introduction of Exhibit 45, appellant requested permission to examine, on *voir dire,* Mr. Gorgerty, the witness who identified that exhibit, which request the court denied [Tr. pp. 918-920]. Subsequently appellant moved the court to strike Exhibits 44 and 45 from the record upon the ground that the copy of the insurance policy, Exhibit 44, was received in evidence upon the testimony of Mr. Gorgerty that it was a true copy of the original, which was upon cross-examination established not to be the fact, and that as to Exhibit 45, no foundation whatsoever had been laid, and that said reports had been filled in and signed by Mr. Gorgerty, except for the one report signed in blank by appellant. This motion was likewise denied [Tr. pp. 946-947].

No conceivable reason appears for the introduction in evidence of these exhibits other than to prejudice appellant by implying that appellant was capable of irregular conduct in improperly causing such policy to be transferred from himself to Sam Ormont and himself, doing business as Acme Meat Company.

Lest it be thought that Exhibits 44 and 45 were offered and introduced in evidence for the purpose of establishing the relationship of partners between appellant and Sam

Ormont, and to refute the existence of the relationship of employer and employee, we direct this Honorable Court's attention to the position of the government as reflected by the opening argument to the jury of counsel for the government [Tr. pp. 1464-1465]:

> "But again that is another fact. If everything is open and aboveboard, why are they concealing the fact that they are partners? Why all this to-do over whether they are partners or not? *I can't figure out whether it makes any difference or not, whether they are or aren't, but I know it makes this difference, that everything that is concealed tends to show that the person who you charge as having violated it or not, it tends to show how he operates, and it is one of the facts that you should take into consideration as to the element of willfullness.*" (Emphasis ours.)

Not the slightest relevancy existed between Exhibits 44 and 45 and the offense charged against appellant. Conduct of a party, whether proper or improper, having no connection with or relationship to the payment of income taxes, may not be considered in determining whether the acts of the accused respecting his income and income tax, was or was not willful.

Once again we find that the court erred in denying appellant's motion to strike irrelevant and immaterial exhibits prejudicial to appellant—a prejudice which was enhanced by the permission given by the court to the jury to take all of the exhibits to the jury room, and aggravated by the argument addressed to the jury by counsel for the government respecting these exhibits.

Exhibits 50A and 50B, the court will recall, are the statements of net worth of appellant as of April 30, 1945.

Identical with each other in all respects, except that 50A is unsigned, whereas 50B was signed by appellant.

Appellant objected to the introduction of said exhibits on the grounds that they were incompetent, irrelevant and immaterial, that no foundation had been laid therefor, that same were encompassed within the rule respecting privileged communications, that no *corpus delicti* had been established, and that said exhibits were not within the issues of the case and were subsequent in point of time to the offense charged against appellant. This objection was overruled [Tr. pp. 1108-1109, 1112-1114, incl.].

It has heretofore been pointed out that not a solitary fragment of evidence was introduced to attempt to establish that any part or portion of appellant's assets or liabilities shown by such statement of net worth reflected income of appellant for the year 1944, in excess of the amount reported by appellant, or at all, or to establish any connection between appellant's net worth as of April 30, 1945, or any of the assets or liabilities therein set forth and the offense of which appellant stood accused.

It is fundamental that the mere fact that a person may have acquired and is possessed of assets of marked value is not proof in and of itself that no income tax had been paid thereon, or that such assets were acquired by the evasion of income taxes.

Similarly, it is basic that the mere fact that appellant, on April 30, 1945, was possessed of a substantial net worth, did not give rise to a presumption or create any inference that the acquisition or possession of such net worth was the result of an evasion or attempt to evade the payment of income tax.

> *Gleckman v. U. S.*, 8th Cir. (1935), 80 F. (2d) 394, 399.

Yet the government so treated and regarded appellant's statement of net worth.

Counsel for the government in his opening statement to the jury referred to these Exhibits 50A and 50B [Tr. p. 1493], and expressly invited the jury to fasten guilt upon appellant by speculation and conjecture in the absence of relevant and cogent evidence thereof. Once more the prejudice resultant from the admission, over objection of immaterial exhibits, was enhanced by the permission given to the jury to take all exhibits to the jury room, and aggravated by the argument to the jury by counsel for the government.

SPECIFICATION OF ERROR NO. IV.

Counsel for the Government Was Guilty of Misconduct in Addressing Improper Argument to the Jury.

Because of the fact that the substantially major portion of the evidence in this case was offered and received against Sam Ormont alone, and a comparatively small amount of the entire evidence was offered and received against appellant, it was of prime importance to appellant that only such evidence as was received against and for him be considered by the jury in determining his guilt or innocence.

Counsel for the government, while purporting from the very outset of his argument to consider the cases of appellant and Sam Ormont separately [Tr. p. 1450], in apparent recognition of the legal necessity for so limiting the evidence, however repeatedly referred to and applied against appellant evidence which was not in the record against appellant, and if in the record at all, was there only against his co-defendant, Sam Ormont.

Thus counsel for the government in the portion of his opening argument purportedly directed against Sam Ormont stated [Tr. p. 1470]:

> "You know what was going on with the sale of meat. You know what those payments are. I am not even going to mention them by name. It would be insulting your intelligence to mention them,—these extra, unreported side payments, that he took with the left hand, the amount of money, and put in the left pocket, and then he puts in the Acme books, and takes the extra money with the right hand, and puts it in the right-hand pocket. Oh, that was a joint venture. That was separate and apart. Simultaneously, on the same sale of meats, he has engaged in two separate enterprises, one selling at the price shown on the invoices, and the other getting this unreported additional amount, this extra money, this side money, which was split fifty-fifty, and the legitimate part being split on the basis Mr. Bircher and Mr. Phoebus told you."

It will be observed that the personal pronoun "he," referring to Mr. Ormont, is used throughout the aforequoted statement. In the last sentence thereof, however, Mr. Strong refers to

> ". . . this unreported additional amount, this extra money, this side money, which was split fifty-fifty, and the legitimate part being split on the basis Mr. Bircher and Mr. Phoebus told you."

This reference is and can only be a reference to appellant as well as to Sam Ormont, and by such statement the jury was told that appellant and Sam Ormont split "unreported," "additional," "extra," "side money," notwithstanding the fact that the record was wholly barren of

any evidence that appellant received money from such sources or money that may be so characterized. Not a particle of evidence was introduced against appellant designating the source of any funds received by him, or the nature of the transactions in which such funds were earned.

Any doubt that this portion of the argument of government counsel was directed against appellant as well as Sam Ormont, although purportedly made against Sam Ormont, is dispelled by the immediately succeeding statements made by Mr. Strong to the jury, in which the singular pronoun "he" is changed to the plural form, as follows [Tr. pp. 1470-1471]:

> "And *they* take this money, and *they* put it away, Mr. Ormont particularly, and on the 24th day of May, 1945, when he is caught, he rushes in and files a return. But even in the return which he filed on that day it fails to disclose exactly what happened, because the return, if you will examine it, even there conceals the source of the money. It says, Business or Profession: Miscellaneous enterprises. What miscellaneous enterprises? What enterprises separate and apart from the sale of meat by the Acme Meat Company?" (Emphasis ours.)

The pronoun "he" has now become "they," before reverting again to "he." This change of pronouns from the singular to the plural, which effectively applies against appellant, evidence which is not in the record as to him, is not an isolated instance. Two short paragraphs later Mr. Strong again shifts from the pronoun "he" to "their" in the following statement, still purportedly made against Sam Ormont [Tr. pp. 1471-1472]:

> "I ask you, ladies and gentlemen, if that kind of testimony will tell, whether that kind of evidence will

convince you that *their* income tax was reported properly, or if it was on a fiscal year basis? Money that comes in as extra payment, money collected, which the right hand keeps from the left hand, money, after the investigation starts in, reported as miscellaneous enterprises, miscellaneous income; no expense, $70,000, split, in two years—do you think that is a *bona fide* business venture, on a fiscal year basis, when he rushed in, on May 24th? I won't go into that. You know what transpired on that date, and his Honor will instruct you as to what you should consider in that connection, and you will decide for yourself if it is a *bona fide* joint venture, *bona fide* business enterprise on a fiscal year basis, or is this just a method concocted up in a hurry, after the investigation has started, to account for money, to excuse it, to report it, to get out of any possible charges of violation." (Emphasis ours.)

Once more we have a reference to highly prejudicial matters dehors the record that other unrelated offenses of which no evidence exists in this record against appellant were committed by him.

A moment or two later, counsel for the government made the following statement [Tr. pp. 1472-1473]:

"Do you think *they* had a separate joint venture, apart from the Acme Meat Company? Even in this return it does not say anything about a partnership. You will remember Mr. Gorgerty testified they said they were partners, and they had an insurance policy, during the same period, and Mr. Gorgerty said that they are partners. They gave the insurance policy as partners. What does this joint venture say? It does not say from what; it does not say anything. 50 per cent of the money to Mr. Ormont, and 50 per cent

to Mr. Himmelfarb. Just take the first eight months of that, which was 1944; take 8/12ths of $70,000, allocate it to each defendant, and then you will know exactly about the income, because there are no books or records. You will know about how much money *they* earned in 1944. That money *they* did not report, although *they* knew *they* earned it in 1944; knew it was part of the operation of the Acme Meat Company; and knew it was side money, in connection with the sale of meat. *They* did not report it.

"Ask yourself this: Do you think *they* would have reported it at any time, if *they* had not been investigated? Ask yourself. If you find this return is phony, just a means of getting out of a trap, after *they* find themselves being investigated, after *they* found that *they* were caught, disregard this return for whatever it is worth." (Emphasis ours.)

Here we find consistent references to "they," although the argument is one which is still purportedly directed against Sam Ormont. Here too we once more have an application against appellant of evidence which, if in the record at all, is not in the record against appellant.

Thus, no evidence was offered or received against appellant that:

(a) Any portion of the earnings of the joint venture, reported in Exhibit 6, the fiscal return for the period May 1, 1944, to April 30, 1945, was earned in the year 1944;

(b) That there are no books or records;

(c) That appellant received any money which he did not report;

(d) That appellant received any money which he knew was earned in 1944;

(e) That appellant knew it was part of the Acme Meat Co.;

(f) That appellant knew that such money was "side-money";

(g) That the return, Exhibit 6, is "phony, just a means of getting out of a trap"; or

(h) That such return was made "after they found that they were caught."

The aforequoted statement was immediately followed by a statement in which there was a complete admixture of the singular and plural pronouns, to wit [Tr. pp. 1473-1474]:

> "*They* don't report on how or where the money came from, but that same day, after it was filed—*they* filed it in the morning; Mr. Ormont went up to see Mr. Bircher and Mr. Phoebus, and had a long discussion. You remember the record. *He* told them where the money was from. You remember *he* tried to get out of saying it was extra payments; side money. *He* made it sound like gifts. *They* disclosed at that time what that money was, and, if everything was above board, clean, honest, and not a violation of law, why didn't *they* put it on the return? Why did *they* have these hieroglyphics? Miscellaneous income, $71,000.00. No explanation; nothing. And there was some testimony that *they* told Mr. Bircher and Mr. Phoebus *they* were afraid of some other agency finding it out. You remember *they* stated that, and that's why *they* concealed it. That is why *they* did not report it.
>
> "But it does not make any difference why *they* did not, so long as it was wilfully and deliberately not reported, and it should have been reported then, so

> far as I am concerned. It is up to you to decide finally, in Count I, whether there was a wilful attempt to evade and defeat the tax which was due." (Emphasis ours.)

In the statement last aforequoted are a number of statements dehors the record as against appellant, including the assertions that:

(a) Mr. Ormont went up to see Mr. Bircher and Mr. Phoebus and had a long discussion on the same day the fiscal return, Exhibit 6, was filed;

(b) That "they," which would include appellant, "disclosed at that time what that money was";

(c) That at that time "they" told Mr. Bircher and Mr. Phoebus "they" were afraid of some other agency finding it out; and

(d) That is why "they" concealed it and why "they" did not report it.

The foregoing statement was shortly followed by the following, which while expressly directed to "he," Mr. Ormont, is so completely entwined with and inseparable from the aforequoted statements that counsel for the government might just as well have continued to use the pronoun "they" [Tr. p. 1475]:

> "Now some questions as to whether these things were gifts, this money he received on the side was gifts. I will leave that to you. You have had experience and you have been in the world long enough. Do you think that in a business which produced an income that was reported of $12,000 for the year 1944, do you think that the customers of that business brought in $70,000 in gifts? That is a new

> term for those side payments, gifts, voluntary gifts. You don't have to pay it, but what do you get if you don't? You know what those payments were."

Both the repetition of the foregoing statements dehors the record as well as the shifting back and forth from the "he" to the "they" and "their" is markedly consistent throughout the argument of government counsel.

It admittedly is sufficiently difficult for a jury to segregate in their minds the evidence received against one defendant alone from the evidence received against his co-defendant only, and we submit that such a task became utterly impossible when counsel for the government applied the evidence received solely as against appellant's co-defendant, Sam Ormont, to the appellant, and expressly invited and requested the jury to apply and consider against appellant such matters dehors the record.

The errors committed by counsel for the government in his opening argument were re-emphasized by him with deadly effect in his closing argument, and the resultant prejudice became eradicable. At almost the commencement of his closing argument, Mr. Strong stated to the jury [Tr. pp. 1545-1546]:

> "Now as I said at the outset, this is a simple case. It involves meat, the sale of meat by the Acme Meat Company, and in connection with that sale of meat *they* collected money which was shown on the invoices and reported on the books. You heard that testimony.
>
> "Besides that, on the other hand, *they* collected some more money. *They* like to call it gifts. *They* like to call it something else. But you know what it is, it is overcharges, extra money on the side. Did

> *they* collect that as a special or separate venture? Was that a separate enterprise that *they* had, as though you would run one factory on one side of the street under one name and another factory on the other side where you are doing something else? No, the evidence here shows that it is exactly the same transaction. You sell the same meat, you get part of the payment with the left hand and part of the payment with the right hand. So of course after they got caught by the investigators, and the investigators came in, *they* have to get some other reason to explain this away to get out of something that *they* have fallen into. So they come up with the joint venture idea. We have talked enough about that joint venture." (Emphasis ours.)

It is evident from the foregoing statement that by the time Mr. Strong commenced his closing argument he had apparently convinced himself that the offense charged against appellant was not an attempt to evade income tax but some offense relating to overcharges and the sale of meat, for he tells the jury in so many words that ". . . this is a simple case. It involves meat, the sale of meat by the Acme Meat Company, . . .," and "Besides that, on the other hand, they collected some more money. . . ."; ". . . it is overcharges, extra money on the side" [Tr. pp. 1545-1546].

And again [Tr. p. 1547]:

> "*They* explained why *they* didn't report themselves as partners, because it might embarrass *them* with some other Government agencies. And *they* explained to you why *they* would rather call these separate payments gifts, because it might embarrass *them* with some other Government agencies. Well, you know

what *they* are doing here. *They* are selling meat, getting money with the right hand and the left hand, and *they* are reporting the money that *they* get with the left hand and not reporting the money that *they* get with the right hand. It is as simple as all that." (Emphasis ours.)

Appellant feels that it is unnecessary to further labor this point. Suffice to say that in this instance too this court will search the record in vain to find any evidence therein against appellant pertaining to or supporting the statements repeatedly made by government counsel in his argument to the jury respecting the matters herein discussed.

During the course of his closing argument counsel for the government stated to the jury that two persons, to wit: Mr. Malin and Mr. Moody, were accessible as witnesses to appellant, were not called by appellant, and inferred that they would have given testimony adverse and prejudicial to appellant, if called. This statement by Mr. Strong is as follows [Tr. pp. 1560-1561]:

"Then Mr. Katz tells you, look at these records. One was prepared by Mr. Moody, he is an accountant; and the other is prepared by Mr. Malin. So what? Where is Mr. Moody? He is the accountant for the defendant and he has something to say in the defense of the defendant, why didn't the defendant put him on the stand to testify? Why didn't they put Mr. Malin on to testify as to what he knows about that? I had him on the stand for a limited purpose, as much as I could get. Did they call him back? Was there something with reference to the preparation of that return which corroborates the defendant Himmelfarb? Why didn't they put Mr.

Malin on the stand to tell you about it then? He is just as accessible to them as he is to me. And if it is their defense, it is their witness. They didn't put Mr. Moody on, they didn't put Mr. Malin on."

There was, of course, no evidence that Mr. Moody was accessible as a witness to anyone, but without regard to the accessibility or non-accessibility of either or both of these persons, the fact remains the burden is not upon appellant to prove his innocence, but the duty rests upon the government to prove his guilt beyond a reasonable doubt. It was consequently improper and prejudicial for counsel for the government to state to the jury that certain witnesses might have been called, or weren't called, or could have been called to establish the innocence of appellant, and to infer that such witnesses were not called because their testimony would have been adverse to appellant.

The charge by an assistant U. S. Attorney in his argument respecting the failure of defendant to call witnesses in his behalf resulted in the deprivation of the presumption that defendant was innocent.

McKnight v. U. S., 6th Cir. (1899), 97 Fed. 208, 211.

Misconduct of counsel and improper argument in extreme cases warrants a reversal.

Berger v. U. S. (1935), 295 U. S. 78, 79 L. Ed. 1314, 55 S. Ct. 629;

Williams v. U. S. (1897), 168 U. S. 382, 398, 42 L. Ed. 509, 18 S. Ct. 92;

Weathers v. U. S., 5th Cir. (1941), 117 F. (2d) 585, 586;

Ippolito v. U. S., 6th Cir. (1940), 108 F. (2d) 668, 670, 671;

U. S. v. Sprengel, 3rd Cir. (1939), 103 F. (2d) 876, 884;

Turner v. U. S., 8th Cir. (1929), 35 F. (2d) 25;

Fontanello v. U. S., 9th Cir. (1927), 19 F. (2d) 921;

Sischo v. U. S., 9th Cir. (1924), 296 Fed. 696, 697;

Fitter, et al. v. U. S., 2nd Cir. (1919), 258 Fed. 567, 572.

Appellant is well aware of the fact that he did not cite the misconduct of government counsel as such during the course of argument and request the court to admonish the jury to disregard as improper Mr. Strong's argument to them. It is necessary, however, that the question of the effect of appellant's failure so to do be approached by this court with a realistic viewpoint, and with a knowledge of appellant's position and the situation then confronting him. First and foremost, appellant at and prior to the time of argument, knew from declarations theretofore made by the trial court that the trial judge was laboring under the misapprehension that because appellant and Sam Ormont had jointly filed the information return, Exhibit 6, and there was testimony in the record against Sam Ormont alone as to where he, Sam Ormont, obtained such money, that the jury could draw an inference from the testimony in the record against Sam Ormont alone that appellant obtained such income in the same manner or from the same place, notwithstanding the fact that the testimony from which such inference was to be drawn was not in the record against appellant [Tr. pp. 1424-1425].

Thus, appellant knew that he was fore-doomed with respect to any such objection. The interposition of an objection and the overruling thereof by the court would merely emphasize such improper argument and more forcefully impress it upon the minds of the jurors. Even if the jury were admonished to disregard these improper statements, upon objection by appellant and request to the court so to do, the prejudicial effects of such statements were such that they could not and would not be removed by an admonition.

Appellate courts must take cognizance of the fact that at times admonition will not remove the prejudicial effects of misconduct of counsel or improper argument addressed to the jury.

> *August v. U. S.,* 8th Cir. (1918), 257 Fed. 388, 393;
>
> *Latham v. U. S.,* 5th Cir. (1915), 226 Fed. 420;
>
> *Skuy v. U. S.,* 8th Cir. (1919), 261 Fed. 316.

In *Latham v. U. S.,* 5th Cir. (1915), 226 Fed. 420, 425, the court in its opinion concerning this point, said:

> "Every one must realize that there are exceptional cases where, although the court does stop counsel, and does caution the jury, the impression has been made by the remarks of counsel, and although the jury honestly try to ignore that impression it still enters and forms a part of the verdict. In such cases the trial court should set aside the verdict on motion for a new trial."

Where the error is one which is seriously prejudicial, it will be noticed and corrected by an appellate court, notwithstanding the absence of objection.

In *Skuy v. U. S.,* 8th Cir. (1919), 261 Fed. 316, 320, it was said anent this question:

> "The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention, but it fails to convince . . . and even if it were tenable this is a trial for an alleged crime; it involves the liberty of a citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment."

In *Latham v. U. S., supra,* the court made this further pertinent observation:

> "The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his argument and statements to the testimony of the wtinesses, in order that no right of the defendant is violated."

SPECIFICATION OF ERROR NO. V.

The Trial Court Erred in Refusing to Charge the Jury as Requested by Appellant in His Proposed Instructions Nos. 17, 22, 25, 27, 29, 30 and 35.

Appellant in his Proposed Instruction No. 17 [Tr. p. 112] requested the trial court to instruct the jury as follows:

> "You are instructed that it is neither criminal nor unlawful for a person to do, or to agree to do, that which the law does not prohibit but recognizes may be lawfully done. So if you believe from the evidence in this case, or if you entertain a reasonable doubt, that whatever act or acts was or were done by the defendants was or were done, not with any criminal intent or not for the purpose of doing or performing any unlawful act, but, on the other hand, was or were done honestly and with an honest intent and purpose and in the belief that such act or acts was or were proper and lawful, then I instruct you that no crime has been committed, and it will be your duty to find the defendant Phillip Himmelfarb not guilty."

The court refused so to do, which refusal the appellant excepted to on the ground that said proposed instruction is a proper statement of the law and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 112, 1442].

The court is upon request required to give a specific instruction cast in the language of the foregoing instruction, and the charge by the court of the presumption of innocence or the element of "willfulness" does not dispense with such necessity.

Appellant in his Proposed Instruction No. 22 [Tr. p. 113] requested the trial court to instruct the jury as follows:

> "You are instructed that if you find from the evidence that defendant Phillip Himmelfarb did prepare and file, or caused to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, and you are unable to determine from the evidence whether such return was or was not false or fraudulent, or if you have a reasonable doubt as to whether such return was or was not false or fraudulent, you must find the defendant Phillip Himmelfarb not guilty."

The court refused to so instruct the jury, which refusal appellant excepted to on the ground that said proposed instruction is a correct statement of the law and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. p. 1443].

Appellant's proposed instruction No. 22 is a proper statement of the law.

Malone v. U. S., 7th Cir. (1938), 94 F. (2d) 281;

Hargrove v. U. S., 5th Cir. (1933), 67 F. (2d) 820;

Spies v. U. S. (1943), 31 U. S. 492, 87 L. Ed. 418, 63 S. Ct. 364.

The general charge that the burden is upon the government to prove the guilt of the defendant beyond a reasonable doubt as to all of the elements of the offense charged did not dispense with the necessity for giving such requested instruction.

Appellant in his Proposed Instruction No. 25 [Tr. p. 123] requested the trial court to instruct the jury as follows:

> "You are instructed that if you find from the evidence that defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, and that in the preparation and filing thereof defendant Phillip Himmelfarb was acting under a mistake of fact respecting, or was in ignorance of, the truth or falsity of the matter set forth in such return, you must find the defendant Phillip Himmelfarb not guilty."

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 123, 1442].

A taxpayer is not guilty of a violation of Section 145 (b) of the Internal Revenue Code in preparing and filing an income tax return under a mistake of fact respecting, or in ignorance of the truth or falsity of the matter therein set forth.

Hargrove v. U. S., 5th Cir. (1938), 67 F. (2d) 820;

U. S. v. Schenck, 2nd Cir. (1942), 126 F. (2d) 702.

An accused is entitled to a specific instruction that the jury must acquit him if they find that his income tax was prepared and filed under a mistake of fact or in ignorance

of the truth or falsity of the matters set forth therein, and the general instruction respecting willfulness does not dispense with the requirement to give upon request such specific instruction.

Appellant in his Proposed Instruction No. 27 [Tr. p. 114] requested the trial court to instruct the jury as follows:

> "You are instructed that in a prosecution for wilfully attempting to evade income taxes the Government must prove not only that the defendants attempted wilfully to defraud it, but must establish that a tax in addition to what the defendants had already paid remains owing. Therefore, if you find from the evidence that the defendant Phillip Himmelfarb paid all of the income tax due and owing by him for such calendar year 1944, or paid an amount in excess of the income tax due and owing by him for such calendar year 1944, you must find him not guilty of Count II of the indictment, irrespective of whether he did or did not wilfully attempt to evade income taxes for such year."

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 114, 1443].

The charge that it is unnecessary for the government to prove the precise amount of tax which was due on the income of appellant as alleged in the indictment, and that it is sufficient if the government establishes that the true taxable income was substantially in excess of the amount reported in the return, does not dispense with the necessity for giving the aforequoted specific instruction.

Appellant in his Proposed Instruction No. 29 [Tr. p. 124] requested the trial court to instruct the jury as follows:

> "You are instructed that if you find from the evidence that the defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed the income tax return referred to in Count II of the indictment, and that such return did not set forth the true and correct net income and the amount of tax due and owing thereon, as a result of mere negligence or carelessness of defendant Phillip Himmelfarb in making such return, you must find the defendant Phillip Himmelfarb not guilty."

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 124, 1443].

A taxpayer who files an income tax return which because of negligence or carelessness does not set forth the true and correct net income and amount of tax due and owing thereon, is not guilty of a violation of Section 145 (b) of the Internal Revenue Code.

> *U. S. v. Schenck,* 2nd Cir. (1942), 126 F. (2d) 702.

The requirement to give a specific instruction that appellant was entitled to an acquittal at the hands of the jury if the return filed by him as a result of his mere negligence or carelessness did not set forth the true and correct income and amount of tax due and owing thereon, was not dispensed with by the general instruction that

in order to convict it is necessary for the jury to find the acts of the defendant to have been done wilfully.

Appellant in his Proposed Instruction No. 30 [Tr. p. 125] requested the trial court to instruct the jury as follows:

> "You are instructed that if you find from the evidence that defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, but are unable to determine from the evidence whether or not defendant Phillip Himmelfarb did so in the honest belief that such return was true and correct, or if said defendant was acting under a mistake of fact respecting, or in ignorance of, the truth or falsity thereof, you must find the defendant Phillip Himmelfarb not guilty."

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 125, 1443-1444].

It is the law that a taxpayer in the preparation and filing of an income tax return under a mistake of fact respecting, or in ignorance of the truth or falsity of the matter therein set forth, is not guilty of a violation of Section 145 (b) of the Internal Revenue Code.

Hargrove v. U. S., 5th Cir. (1933), 67 F. (2d) 820;

U. S. v. Schenck, 2nd Cir. (1942), 126 F. (2d) 702.

An accused is entitled to a specific instruction that he is entitled to an acquittal if the jury finds that his income tax was prepared or filed under a mistake of fact or in ignorance of the truth or falsity of the matters set forth therein, and the general instruction respecting wilfulness does not dispense with the necessity for giving, upon request, such specific instruction.

Appellant in his Proposed Instruction No. 35 [Tr. p. 126] requested the trial court to instruct the jury as follows:

> "You are instructed that if you find from the evidence that the defendant Phillip Himmelfarb believed that any income received by him from a partnership or joint venture was accountable and the tax thereon was payable by him as income for the year 1945, then and in that event it is your duty to find the defendant Phillip Himmelfarb not guilty even though you may believe that he was mistaken as to when or in what year such income was accountable and payable."

The court refused to so charge the jury, which refusal the appellant excepted to on the ground that said proposed instruction is a correct statement of the law, and that the legal principles therein set forth were not covered by any other instruction to the jury [Tr. pp. 126, 1444].

It is the law that a taxpayer in the preparation and filing of an income tax return under a mistake of fact respecting, or in ignorance of the truth or falsity of the

matter therein set forth, is not guilty of a violation of Section 145 (b) of the Internal Revenue Code.

Hargrove v. U. S., 5th Cir. (1933), 67 F. (2d) 820;

U. S. v. Schenck, 2nd Cir. (1942), 126 F. (2d) 702.

An accused is entitled to a specific instruction that he must be acquitted if the jury finds that his income tax return was prepared or filed under a mistake of fact or in ignorance of the truth or falsity of the matters set forth therein, and the general instruction respecting wilfulness does not dispense with the necessity for giving, upon request, such specific instruction.

The refusal by a court of a proper request for instruction to the jury is reversible error.

U. S. v. Schanerman, 3rd Cir. (1945), 150 F. (2d) 941, 946;

Pinkerton v. U. S., 5th Cir. (1944), 145 F. (2d) 252, 255;

U. S. v. Murdoch (1933), 290 U. S. 389, 396, 78 L. Ed. 381, 54 S. Ct. 223;

Gold v. U. S., 3rd Cir. (1939), 102 F. (2d) 350, 352;

McAdams v. U. S., 8th Cir. (1934), 74 F. (2d) 37, 40;

U. S. v. Byers, 2nd Cir. (1934), 73 F. (2d) 419;

Little v. U. S., 10th Cir. (1934), 73 F. (2d) 861, 867.

It seems settled that where a correct proposition of law essential to the proper determination of an issue submitted to a jury is incorporated by the defendant into a requested special instruction which is not in substance or in effect given in the charge to the jury, or is not covered in the general charge of the court, the refusal to give the instruction is reversible error.

U. S. v. Schanerman, 3rd Cir. (1945), 150 F. (2d) 941, 946;

Hersh v. U. S., 9th Cir. (1934), 68 F. (2d) 799, 807;

Hendrey v. U. S., 6th Cir. (1916), 233 Fed. 5, 18;

Calderon v. U. S., 5th Cir. (1922), 279 Fed. 556.

The court having charged the jury that if they find that the appellant wilfully and intentionally attempted to defeat and evade the payment of tax due the United States of America by filing a false and fraudulent return in which he failed to disclose the true and correct amount of income received, the government is entitled to a verdict of guilty, the court, should upon request, have given the charge that if the jury failed to find the essentials of the crime charged defendant should be acquitted—the converse of the charge given, which puts to the jury appellant's side of the case.

Little v. U. S., 10th Cir. (1934), 73 F. (2d) 861.

SPECIFICATION OF ERROR NO. VI.

The Trial Court Erred in Denying Appellant's Motions for an Acquittal Notwithstanding the Verdict of the Jury, and in the Alternative, for a New Trial.

After the verdict of the jury finding appellant guilty of the offense charged against him in Count II of the indictment, appellant moved the court for judgment of acquittal notwithstanding the verdict of the jury, and in the alternative, for a new trial, as to said Count II [Tr. pp. 134-135]. These motions the court denied [Tr. p. 1608].

The foregoing motions were based upon the following grounds, to wit:

(1) The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence on the part of the prosecution;

(2) The court erred in denying defendant's motion for acquittal made at the conclusion of all the evidence;

(3) The verdict is contrary to the weight of the evidence;

(4) The verdict is not supported by substantial evidence; and

(5) That counsel for the government was guilty of misconduct in addressing improper argument to the jury.

All of the grounds comprising the basis for these motions have heretofore been separately considered and discussed herein. It amply appears therefrom that the motions for acquittal notwithstanding the verdict of the jury, or in the alternative, for a new trial, were well taken and should have been granted.

Appellant respectfully submits that this court must, after a consideration of the record against appellant in this case, conclude as was concluded by the court in *Strickland v. U. S.*, 5th Cir. (1946), 155 F. (2d) 167:

> "When the facts of this case are carefully considered and weighed, it becomes patent that they do not measure to the guilt of defendant."

Respectfully submitted,

William Katz,
Attorney for Appellant.